To be argued by:
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Time Requested: 15 Minutes

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

GAY ALLIANCE OF GENESEE VALLEY, INC.

Plaintiff - Respondent,

vs.

INDEX NO. 8872/91
JUSTICE ANDREW SIRACUSE

CITY ASSESSOR,
CITY OF ROCHESTER, NEW YORK,

Defendant - Appellant.

BRIEF FOR THE GAY ALLIANCE OF GENESEE VALLEY, INC. AS RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 2

INTRODUCTION 4

STATEMENT OF FACTS 5

Facts Relating to the Gay Alliance of Genesee Valley . . 5

Litigation History 9

ARGUMENT 14

POINT 1: AS A NOT FOR PROFIT CORPORATION ORGANIZED FOR CHARITABLE, EDUCATIONAL AND "MORAL OR MENTAL IMPROVEMENT OF MEN, WOMEN OR CHILDREN" PURPOSES, THE GAY ALLIANCE OF GENESEE VALLEY IS ENTITLED TO A MANDATORY PROPERTY TAX EXEMPTION FOR ITS COMMUNITY CENTER. 14

POINT 2: BY TREATING THE GAGV DIFFERENTLY THAN OTHER ORGANIZATIONS IN ITS DECISION TO DENY THE GAGV A PROPERTY TAX EXEMPTION, THE CITY VIOLATED THE GAGV'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO FREEDOM OF SPEECH, ASSOCIATION AND EQUAL PROTECTION UNDER LAW. 24

POINT 3: IN LIGHT OF THE CITY'S EXTREME DELAY IN SEEKING DISCOVERY IMMATERIAL TO ITS DEFENSES, THE COURT BELOW PROPERLY BARRED THE CITY FROM CONDUCTING A DEPOSITION OF THE GAGV'S PRESIDENT, AND PROPERLY FOUND THAT A SANCTIONS HEARING IS WARRANTED.. 37

POINT 4. SO LONG AS IT PREVAILS ON ITS CLAIM THAT IT IS ENTITLED TO A PROPERTY TAX EXEMPTION, THE GAGV IS ENTITLED TO ATTORNEYS FEES UNDER 42 U.S.C. §1988. 41

CONCLUSION 43

TABLE OF AUTHORITIES

FEDERAL CASES

Bowen v. Georgetown University Hospital,
488 U.S. 204, 109 S.Ct. 468 (1988) 36

Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286 (1980) 33

Citizens Against Rent Control v.
City of Berkeley, 454 U.S. 293, 102 S.Ct. 434 (1981) 25

Coalition for Abortion Rights and Against
Sterilization Abuse v. Niagara Frontier
Transportation Authority,
584 F.Supp. 985 (W.D.N.Y. 1984) 33, 34

Gay Students Organization of University of
New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974) 33

Huntington Branch, NAACP v.
Town of Huntington, 844 F.2d 926 (2d Cir. 1988) 36

Lawrence University Bicentennial Commission
v. City of Appleton, Wisconsin,
409 F.Supp. 1319 (E.D. Wis. 1976) 34

NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163 (1958) 25

North Shore Right to Life v. Manhasset
American Legion Post No. 304, Town of
North Hempstead, 452 F.Supp. 834 (E.D.N.Y. 1978) 33, 34

Penthouse International, Ltd. v. Koch,
599 F.Supp. 1338 (S.D.N.Y. 1984) 33

Perry Education Association v. Perry Local
Educators' Ass'n, 460 U.S. 37, 103 S.Ct. 948 (1983) 33

Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694 (1972) 33

Planned Parenthood Association/Chicago Area
v. Chicago Transit Authority,
592 F.Supp. 544 (N.D. Ill. 1984) 33

Police Department of City of Chicago v.
Mosley, 408 U.S. 92, 92 S.Ct. 2286 (1972) 24, 25, 33

Santiago v. Miles, 774 F.Supp. 775 (W.D.N.Y. 1991) 35

Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Commission, 417 F.Supp. 632 (D.R.I. 1976) 33

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 35

STATE CASES

303 West 42nd Street Corp. v. Klein, 46 N.Y.2d 686 (1979) 36

Asia Society v. Tax Commission of NYC, 92 A.D.2d 781 (1st Dept. 1983) 22

Association of the Bar, City of New York v. Lewisohn, 34 N.Y.2d 143 (1974) 20

Church Home of the Protestant Episcopal Church in the City of Rochester v. Wagner, 58 A.D.2d 972 (4th Dep't 1977) 22, 24, 40, 41

Cleary v. Perales, 191 A.D.2d 209 (1st Dep't 1993) 42

Dutch Church v. 198 Broadway, 76 N.Y.2d 411 (1990) 41

Gay Alliance of Genesee Valley, Inc. v. City Assessor, City of Rochester, 599 N.Y.S. 2d 370 (Sup. Ct. Monroe Cty. 1993) 1

Home Savings Bank v. Arthurkill Associates, 173 A.D.2d 776 (2d Dep't 1991) 40

Immuno AG. v. J. Moor-Jankowski, 77 N.Y.2d 235 (1991) 25

Kahal Bnei v. Fallsburg, 78 N.Y.2d 194 (1991) 9

Kracker v. Spartan Chemical Co., Inc., 183 A.D.2d 810 (2d Dep't 1992) 30, 40

Kuehne & Nagel, Inc. v. Baiden, 36 N.Y.2d 539 (1975) 30

Levy, King & White Advertising, Inc. v. Gallery of Homes, Inc., 177 A.D.2d 967 (4th Dep't 1991) . . . 40

Matter of Frankel v. Roberts, 165 A.D.2d 382 (1st Dep't 1991) . . . 33

Matter of Thom, 33 N.Y.2d 609 (1973) 34, 35

Matter of Thomasel v. Perales, 78 N.Y.2d 561 (1991) 42

Mohonk Trust v. Board of Assessors of Town of Gardiner, 47 N.Y.2d 476 (1979) 18, 19, 20

N.Y. Botanical Garden v. Assessors, Town of Washington, 55 N.Y.2d 328 (1982) 19, 20

North Manursing Wildlife Sanctuary v. City of Rye, 48 N.Y.2d 135 (1979) 18, 19

Pokoik v. Gittens, 171 A.D.2d 470 (1st Dep't 1991) 30, 37

Porter v. Callahan, 125 A.D.2d 891 (3rd Dep't 1986) 37

Presbyterian Residence Center Corporation v. Wagner, 66 A.D.2d 998 (4th Dep't 1978) 31

Swedenborg v. Lewisohn, 40 N.Y.2d 87 (1976) 20, 21

Symphony Space v. Tishelman, 60 N.Y.2d 33 (1983) . . . . . passim

CONSTITUTIONS, STATUTES AND REGULATIONS

N.Y. State Constitution 14, 25

N.Y. Real Property Tax Law §420-a . . . . . passim

C.P.L.R. Rule 3212 . . . . . 9, 10

22 N.Y.C.R.R. §130-1 . . . . . 1, 40, 43

United States Constitution 24

42 U.S.C. §1983 . . . . . 10, 13, 41

42 U.S.C. §1988 . . . . . 1, 3, 10, 13, 41

PRELIMINARY STATEMENT

This action by the Gay Alliance of the Genesee Valley, Inc. [GAGV] against the City Assessor of Rochester, New York [City] challenges the denial of the GAGV's request for a property tax exemption under N.Y. Real Property Tax Law [R.P.T.L.] §420-a as a violation of the law and of its constitutional rights to freedom of speech, association, and equal protection. The City appeals from a Memorandum Decision of the Supreme Court, Monroe County (Siracuse, A.), dated April 6, 1993 (R. 6-27), entered as an Order on April 20, 1993 (4-5)[1] that: (1) granted the GAGV's Motion for a Protective Order; (2) granted the GAGV's Summary Judgment Motion; (3) denied the City Assessor's Summary Judgment Motion; (4) awarded the GAGV repayment of its paid taxes, with statutory interest; (5) held that the GAGV was entitled to attorneys' fees under 42 U.S.C. §1988, subject to a later determination of the amount; and (6) found that sanctions against the City might be warranted pursuant to 22 N.Y.C.R.R. §130-1, subject to a hearing. See Gay Alliance of Genesee Valley, Inc. v. City Assessor, City of Rochester, 599 N.Y.S. 2d 370 (Sup. Ct. Monroe Cty. 1993).

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[1] Numbers in parentheses are Record page numbers.

QUESTIONS PRESENTED

1. As an organization that carries out a combination of charitable and educational activities, and activities for the moral or mental improvement of men, women, or children, is the GAGV entitled to a mandatory property tax exemption under N.Y. Real Property Tax Law §420-a?

The court below answered yes.

2. Does the undisputed evidence that the City Assessor: (1) has consistently granted property tax exemptions to organizations that have purposes and activities similar to those of the GAGV; (2) has consistently granted tax exemptions to organizations that have characteristics similar to characteristics upon which the City ostensibly based its decision to deny the GAGV a property tax exemption; (3) has not denied property tax exemptions to organizations that have purposes and activities similar to those of the GAGV, establish that the City Assessor violated the GAGV's constitutional rights to freedom of speech, freedom of association, and equal protection?

The court below answered yes.

4. Does the City's exceptionally dilatory conduct in serving eleventh-hour discovery requests seeking irrelevant information entitle the GAGV to a protective order with respect to a deposition of the GAGV's president, and support an inference that sanctions might be warranted so as to justify a hearing?

The court below answered yes.

4. As a prevailing party in this action, is the GAGV entitled to an award of attorneys' fees in this action under 42 U.S.C. §1988?

The court below answered yes.

INTRODUCTION

This action challenges the Rochester City Assessor's illegal and unconstitutional refusal to grant a property tax exemption to the Gay Alliance of Genesee Valley, Inc. for the building it owns and uses as a Community Center. As a not-for-profit corporation that is organized exclusively for a combination of charitable, educational and "moral or mental improvement of men, women, or children" purposes, the GAGV's building is entitled to a mandatory tax exemption pursuant to New York Real Property Tax Law §420-a.

The City's several professed reasons for denying a property tax exemption to the GAGV, advanced at various times over the course of this litigation -- namely, that the GAGV is not technically an educational institution, that the GAGV's purposes and activities include an advocacy component, that the GAGV does not receive public grants, and that the GAGV does not, as a central purpose or activity, provide free services to indigent persons -- are invalid and spurious grounds for its decision. Indeed, the City has a steadfast practice of granting property tax exemptions to other Rochester organizations that are not technically educational institutions, that advocate for stated causes, that may not receive public grants, and that do not, as a central purpose or activity, provide free services to indigent persons.

Despite the City's assertion to the contrary, this history confirms irrefutably that it denied the GAGV a property tax exemption because of its gay and lesbian membership and message.

For the reasons stated by the GAGV and amici, such a reason constitutes the illegal denial of the GAGV's constitutional rights to free speech and association and to equal protection under law.

STATEMENT OF FACTS

Facts Relating to the Gay Alliance of Genesee Valley

The Gay Alliance of Genesee Valley, Inc., in existence for more than 20 years, is a non-profit membership organization in Rochester, New York. Its primary purposes include the eradication of homophobia, the delivery of unbiased health care, the procurement and maintenance of equal rights for lesbians and gay men, the improvement of the quality of life of the general public as well as the lesbian and gay community through education, the operation of a community center and the education of the general public about their civil rights (286-287, 295-300).

The GAGV's membership is comprised of individuals and interest groups who work in a myriad of ways, on a volunteer basis, to provide counseling, support, cultural, and social services to its members, to educate the general public about homosexuality and related issues, and to promote equal rights for lesbians and gay men in the Rochester area community (242-245, 286-288, 313-315). In furtherance of its goals, the GAGV's members carry out a wide range of activities, all of which are available to its membership and the general public at no or minimal cost. The GAGV has a Speakers' Bureau that provides public speakers to high schools, colleges, and other organizations in the area, such as Mental

Health Clinics, who wish to learn about homosexuality. The GAGV trains and coordinates "peer facilitators" who respond to "hotline" phone calls. The GAGV coordinates a Gay and Lesbian Youth Group that meets regularly. The GAGV publishes a monthly newspaper that is available free of charge to every person in the Rochester area (242-245, 311-315, 317).

Within the last few years, the GAGV worked closely with the Monroe County criminal justice system to develop a sensitivity training for individuals convicted of assaulting gay men in Rochester (314). More recently, the GAGV has conducted workshops on racism and safer sex, all open to the public and free of charge. Other free workshops were conducted for the friends and family of people who have died of AIDS; the participants of these workshops were primarily heterosexual (243-244).

In addition, the GAGV acts as an umbrella organization for a number of lesbian and gay-related community groups, such as several literary groups, the Lesbian Resource Center, the Men's Group, Sisters United in Two Spirits (gay women of color), Rainbow of the Deaf (hearing-impaired gay men and women), Brothers United (gay men of color), and Parents and Friends of Lesbians and Gays, whose goals and purposes are consistent with those of the GAGV (242-245, 311-315, 317).

To pay for its activities and Community Center, the GAGV relies primarily on the private funds it receives through membership fees, donations, and fundraising activities, such as its annual auction and picnic (245, 314). In addition, the GAGV has

also received grants from the New York State Department of Health, Arts for Greater Rochester and the United Way (245). No pecuniary profit inures to the benefit of any of the GAGV's employees, officers, or members (168, 288, 295-296).

Given its purposes, structure, and activities, the GAGV was incorporated as a not-for-profit corporation pursuant to Section 216 of the New York Education Law and Section 404(d) of the New York Not-for-Profit Law on December 14, 1973 (295-307, 311). On November 19, 1981, the GAGV was granted federal tax exempt status as a charitable, educational, or religious organization pursuant to Section 501(c)(3) of the U.S. Internal Revenue Code (308-309, 311).

In March 1990, seventeen years after its incorporation, the GAGV realized a dream. It purchased the building located at 179-183 Atlantic Avenue in Rochester, New York to use as a Community Center and home base for its activities (288). Every activity that the GAGV performs in and out of the Center is related to the furtherance of its purposes and goals (288, 314-315). The GAGV performs no commercial function, nor is any commercial function performed out of the Center (288, 314).

On January 28, 1991, the Gay Alliance of Genesee Valley, Inc. submitted a form application to the Rochester City Assessor for a mandatory property tax exemption for its Community Center (316-324). In a letter dated March 8, 1991, the Deputy City Assessor advised the GAGV that its application was denied because the GAGV "is not an educational organization" (325-326).

The GAGV filed an administrative appeal Complaint, accompanied

by an affidavit of its then-President, Claire Parker, to the Rochester Board of Assessment Review to challenge the City Assessor's decision on March 22, 1991 (311-315, 327-332). The GAGV contended that it has a combination of educational, charitable, and "moral or mental improvement of men, women or children" purposes and functions that entitle it to a property tax exemption (333-335). GAGV President Claire Parker testified and answered the Board's and City Attorney's questions under oath (37j-37k, 173, 289).

The Review Board had access to copies of the GAGV's New York incorporation papers, IRS tax-exemption letter, and 1989 tax returns that had been submitted with the GAGV's initial application (56-74, 295-307, 308-309, 316). Further, the GAGV produced every supplemental document requested by the Board (337-348).

At the hearing, the City changed its tune, as it would do time and again. The City no longer insisted that the GAGV did not qualify for a tax exemption because it was not an educational institution of learning. Instead, the City now maintained that the GAGV was ineligible for a tax exemption because its activities were driven by a specific point of view and, as such, its purpose was advocacy and not educational (235-236). The City ignored the GAGV's contention that its purposes and activities fell within a combination of exempt purposes and activities, not just educational purposes and functions 235-236).

In an undated form notice received on or about April 30, 1991 (348), confirmed in a letter dated August 22, 1991 (237-238), the

GAGV learned that its administrative appeal had apparently been denied.[2] Having exhausted all its administrative remedies, the GAGV went to court to obtain relief.

Litigation History

On August 23, 1991, the GAGV filed suit to reverse Rochester's denial of its property tax exemption for its Community Center (283-351).[3] On November 13, 1991, the City filed its Verified Answer to the GAGV's Verified Complaint (275-280). Between November 1991 and October 1992, GAGV's counsel conducted an extensive investigation of the City's property tax exemption decisions and of other property tax exemption decisions in New York State (371).

On October 15, 1992, the GAGV moved for summary judgment, supported by its required C.P.L.R. Rule 3212 Affirmation of Undisputed Facts (166-177), and the substantial evidence it had amassed (163-266). The GAGV submitted extensive documentary evidence showing that the City had consistently granted property tax exemptions to other organizations with advocacy-related purposes and activities analogous to those of the GAGV (183-224,

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[2] The undated form notice received by the GAGV in April appeared to be an incorrectly sent form inasmuch as purported to deny the GAGV's nonexistent request to increase its assessment (348). In response to a phone call from the GAGV's attorney, however, the City's attorney insisted that the form notice adequately responded to the GAGV's administrative appeal (237-238).

[3] At the City's insistence, the parties stipulated to the conversion of the GAGV's Article 78 summary proceeding to a declaratory judgment action against the City Assessor (177, 280). It is nonetheless clear that the GAGV could have proceeded in its Article 78 proceeding. See Kahal Bnei v. Fallsburg, 78 N.Y.2d 194 (1991).

248-255), and conversely, that the City had never denied a property tax exemption to an organization with primary advocacy purposes and activities analogous to those of the GAGV (246-249, 256-257). The GAGV also submitted documentary evidence revealing that Albany and New York City had granted property tax exemptions to community centers owned by gay and lesbian organizations virtually identical in their purposes and activities to the GAGV (225-234, 258-265). Finally, the GAGV simultaneously moved to amend its Complaint to clarify that its federal constitutional claims were actionable under 42 U.S.C. §1983 and to request attorneys' fees under 42 U.S.C. §1988 (163-181).

On November 12, 1992, the City filed papers opposing the GAGV's motion, and cross-moving for summary judgment (267-274). In so doing, the City did not indicate that it would need additional information from the GAGV to support its defenses to the GAGV's statutory or constitutional claims. Instead, without denying a single fact in the GAGV's Rule 3212 Affirmation of Undisputed Facts or filing its own Rule 3212 Affirmation, and relying exclusively on the affidavit of the City Assessor and the Rochester City Council's anti-discrimination resolution of December 27, 1983, the City denied that its decision in the GAGV property tax exemption matter constituted unconstitutional discrimination against the GAGV (268-274).

Additionally, the City broached two new rationalizations for its property tax exemption decision that until now had never been mentioned. First, while not disputing that several organizations

with property tax exemptions had key advocacy purposes and activities of several tax exempt organizations analogous to those of the GAGV,[4] the City alleged that some of these organizations, apparently unlike the GAGV, were entitled to be deemed "charitable" organizations because they had received public grants (271). In fact, although the City had never asked the GAGV about this ostensibly essential fact, the GAGV has received a number of public grants (245). Second, the City maintained that only organizations that provide goods and services to "needy" persons could be designated "charitable" organizations. See (271); City's Memorandum of Law in Support of Cross-Motion for Summary Judgment, November 12, 1992, pp. 8-9.

Following oral argument on December 1, 1992, the court below ordered the GAGV's application for a property tax exemption amended to reflect that the boxes for the "charitable" and "moral or mental improvement of men, women or children" purposes in its original application were checked in addition to the "educational" box, nunc pro tunc to the date of the GAGV's original application. The court below also ordered the Board of Assessment Review to issue a revised decision on the GAGV's request for the exemption. Finally, to give the City an opportunity to reconsider its earlier decision, the court denied both of GAGV's motions without prejudice to renew if necessary (161-162). In so doing, the court clearly intended for the Review Board to provide specific reasons for its forthcoming

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[4] These organizations are Group 14621 Community Association (198-204), the Regional Council on Aging (205-211), the 19th Ward Community Association (212-216), and the YWCA (217-224).

decision (151).

Ignoring the court's explicit instructions, the Review Board issued a decision rejecting the GAGV's application without any explanation at all (152-153). Accordingly, on January 12, 1993, the GAGV filed its Renewed Motion to Amend Its Verified Complaint (132-139). At oral argument on February 18, 1993, the GAGV indicated that it intended to file its Renewed Summary Judgment Motion as soon as an Answer was filed, and the City "conceded that no further factual submissions were necessary, at least as far as GAGV's property tax issue was concerned" (11). On February 26, 1993, the court below granted the GAGV's Renewed Motion to Amend Its Complaint (128-131). To avoid any further delay on the ultimate resolution of this case, the GAGV personally served its Amended Verified Complaint the next day (118-127).

The City served its Answer on March 22, 1993 (112-117). At the same time, the City served discovery demands for additional GAGV financial documents spanning several years, and to produce the GAGV's current President for a deposition -- its first discovery requests in the nineteen-month history of the litigation (110, 111). In response, the GAGV immediately provided the City with every document it requested (56-109), but moved for a protective order with respect to the GAGV President's deposition (37a-37o). Simultaneously, on March 23, 1993, the GAGV filed its expected Renewed Motion for Summary Judgment (28-37). On April 1, 1993, the City filed its Cross-Motion for Summary Judgment, in which it also opposed the GAGV's Motion for a Protective Order (38-109).

On April 6, 1993, following oral argument, the court below issued a Memorandum Decision addressing all pending motions (6-27). The court's decision granted the GAGV's Motion for a Protective Order, and ordered a hearing on the issue of whether sanctions should be imposed on the City for serving harassing and unnecessarily dilatory discovery requests on the GAGV. On the merits, the court granted summary judgment in the GAGV's favor, finding that the GAGV met the statutory requirements for a mandatory property tax exemption, and holding that the undisputed evidence proved that the City's denial of the GAGV's property tax exemption application intentionally discriminated against the GAGV on account of its gay and lesbian membership and message in violation of the GAGV's federal constitutional rights, as made actionable by 42 U.S.C. §1983. Lastly, the court found that the GAGV was entitled to attorneys' fees pursuant to 42 U.S.C. §1988, the amount to be determined later upon motion of the GAGV.

On May 11, 1993, the City appealed from "each and every part of such order" (3).

ARGUMENT

POINT 1: AS A NOT FOR PROFIT CORPORATION THAT IS ORGANIZED FOR CHARITABLE, EDUCATIONAL AND "MORAL OR MENTAL IMPROVEMENT OF MEN, WOMEN OR CHILDREN" PURPOSES, THE GAY ALLIANCE OF GENESEE VALLEY IS ENTITLED TO A MANDATORY PROPERTY TAX EXEMPTION FOR ITS COMMUNITY CENTER.

Under N.Y. Real Property Tax Law §420-a, real property owned by a corporation that is:

> organized or conducted exclusively for ... charitable, ... educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes ....

is entitled to a property tax exemption, so long as no "officer, member or employee ... receive[s] any pecuniary profit from the operations thereof ... ." N.Y. Real Property Tax Law §§420-a(1)(a), (b). This exemption is not a discretionary privilege; rather, it is a constitutional and statutory right for any corporation and its property that meet the provision's prerequisites. See N.Y. Constitution, Article 16, §1.

The Gay Alliance of Genesee Valley, Inc., and the Community Center it owns, fully satisfy the three criteria for a mandatory tax exemption under N.Y. Real Property Tax Law §420-a. Addressing the latter two conditions first, the sworn statements and documentary evidence in the Record plainly demonstrate that the GAGV's building is used exclusively to further its purposes and goals and that no pecuniary profit inures to the benefit of any of the GAGV's employees, officers, or members (168, 288, 295-296, 311-314). The City does not dispute the GAGV's satisfaction of these

two prerequisites for a property tax exemption (13). The court below thus addressed only the first requirement for mandatory tax exempt status.

Based on its review of the Record, the court below held that the GAGV is "organized or conducted exclusively for ... charitable,... educational, or moral and mental improvement of men, women or children, or for two or more such purposes." NY Real Property Tax Law §420-a (22). Specifically, the court found that the GAGV's principal or primary purpose[5] is "to build understanding' eliminate discrimination, and provide counseling and support" (21).

To further its purposes, the GAGV conducts a wide variety of activities, ranging from the publication and city-wide distribution of a free monthly newspaper, workshops on racism and AIDS, the provision of speakers about homosexuality to schools, universities, and organizations throughout the area, and peer facilitators, to a Gay and Lesbian Youth Group, social gatherings, and coordination and assistance to the Rochester City Police Department. The GAGV also acts as a "home base" for other volunteer organizations who have, as their common link, purposes consistent with those of the GAGV.

The court below correctly found that the GAGV's activities: (1) contribute to the moral and mental improvement of the entire community by building tolerance between the gay community and the

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[5] The term "exclusive" as used in N.Y.R.P.T.L. §420-a has been held to mean "principal" or "primary." See, e.g., Symphony Space v. Tishelman, 60 N.Y.2d 33, 38 (1983).

larger public; (2) educate on topics of pressing importance to all; and (3) furnish important social welfare services through its hotline and support programs (20). Thus, the court properly held that the GAGV met its burden of proof in demonstrating that it was educational, charitable and relevant to the moral and mental improvement of the population, thereby entitling it to a mandatory real property tax exemption (22). In this way, the GAGV was virtually identical to the gay and lesbian organizations in Albany and New York City that have received property tax exemptions for their community centers (20, 225-234, 260-265).[6]

In bringing this appeal, the City argues extensively that to qualify for a property tax exemption under RPTL §420-a the GAGV must fit entirely "within" at least one of the qualifying categories. See, e.g., Brief on Appeal of the City Assessor, City of Rochester (hereinafter App. Brief), p. 17. That is, the City argues, the GAGV is not wholly educational because it does not conduct traditional classes and expresses a viewpoint; the GAGV is not wholly charitable because it does not distribute funds to the needy; and the GAGV is not for the mental and moral improvement of men, women and children because it is not the YMCA. Therefore, according to the City, the GAGV cannot qualify for tax exemption (18) and App. Brief, pp. 17-18.

However, the court below properly dismissed this argument as

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[6] The Court below is correct in stating that the property tax decisions by these other jurisdictions have no binding authority. However, they are compelling evidence that virtually identical organizations have been found to meet the statutory requirements (20).

fallacious (18). The City's argument flies in the face of the clear language of the statute that exempts groups organized for "two or more... purposes," and thumbs its nose at the Court of Appeals which, as the court noted below, explicitly repudiated the very argument made by the City.

The City's consistent misreading of the Court of Appeal's decision in Symphony Space v. Tishelman, 60 N.Y.2d 33 (1983) defies comprehension. The Court, in rejecting a narrow and fragmentary view of the exemption, could not have refuted the City's position in this case more clearly:

> In contrast with the approach taken by this court, Trial Term, in the present case, has taken a narrow and fragmentary view of the exemption. In rejecting petitioner's argument that it was organized for educational purposes, the court focused on the fact that Symphony Space was not approved by the Commissioner of Education... The court similarly rejected the exemption under the "moral or mental improvement" category... However,this court has not made such requirements necessary before an institution qualifies for a tax exemption under those categories (Matter of North Manursing Wildlife Sanctuary [City of Rye], 48 NY2d 135, supra; see Mohonk Trust v. Board of Assessors of Town of Gardiner, 47 NY2d 476, supra). **In fact, rather than dissecting each exempt purpose, this court has indicated that the statute may encompass property used primarily for various and varied charitable and educational purposes and the moral or mental improvement of the citizenry** (Mohonk Trust v. Board of Assessors of Town of Gardiner, supra, at p. 484).

60 N.Y.2d at 37 (emphasis added).

In order to avoid the plain words of the statute and the Court of Appeals' clear directive in Symphony Space requiring tax exemption where the organization is used for a variety of eligible

purposes, the City has had no alternative but to resort to mischaracterization. For instance, the City attempts to argue that Symphony Space is "really" a case decided pursuant to the "educational" category. See App. Brief, p. 22. However, that strained interpretation ignores the fact that the Court of Appeals determined that it was Symphony Space's broad range of activities, including finding new audiences for performing arts groups and providing performances at little or no charge to the audience, that fell within the "**general categories** of 'charitable, educational and the moral and mental improvement' section of the Real Property Tax Law. Symphony Space, 60 N.Y.2d at 36 (emphasis added).

In its earlier case, Mohonk Trust v. Board of Assessors of Town of Gardiner, 47 N.Y.2d 476 (1979), the Court of Appeals held that the Mohonk Trust land was "used primarily for **an assortment of 'charitable... educational, [and] moral improvement of men women and children' purposes**," 47 N.Y.2d at 484 (emphasis added), and was thus eligible for a tax exemption. The City attempts to dismiss the clear holding in Mohonk by citing North Manursing Wildlife Sanctuary v. City of Rye, 48 N.Y.2d 135 (1979), for the proposition that the Court of Appeals really meant to decide Mohonk under the "charitable" exemption category only. See App. Brief, p. 17. However, nothing in North Manursing undercuts or contradicts the Court of Appeals' interpretation of §420-a in Mohonk permitting an organization to qualify in an assortment, or hybrid, of categories.

Indeed, the issue addressed by the Court of Appeals in North Manursing was not whether the sanctuary fit entirely into the

category of charitable, since categorical eligibility of a wildlife sanctuary had been disposed of in Mohonk by holding that such a sanctuary fit into an assortment of categorical purposes. See North Manursing, 48 N.Y.2d at 139. Rather, the only issue in the case was whether this particular wildlife sanctuary was really open to the public or was a private park benefitting only particular land owners, and thus whether the property was used as a wildlife sanctuary by a charitable organization. North Manursing, 48 N.Y. 2d at 139-140.

The City's twisted reading of Mohonk and North Manursing obfuscates the fact that no wildlife sanctuary would ever qualify under the City's compartmentalized reading of the statute because no traditional classes are held there, no distribution is made to the needy and it is not similar to a YMCA. However, this illogical result was recognized by the court below and properly rejected (19).[7]

On one point, the GAGV agrees with the City: the Court of Appeals did not intend to overrule its earlier tax exemption decisions with the Mohonk, N.Y. Botanical Garden v. Assessors, Town of Washington, 55 N.Y.2d 328 (1982), and Symphony Space decisions. See App. Brief, pp. 16-18. In fact, it is apparent that the City's

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[7] The City's alternative attempt to dismiss the relevance of the Mohonk and other nature preserve cases to this case because the GAGV is not factually similar to a nature preserve, App. Brief p.18, is specious. There is nothing in these cases that states or implies that the principles discussed are applicable solely to nature preserves. Although the GAGV is not a nature preserve, it is an organization that like a nature preserve does not conduct classes or distribute goods to the needy, and is not a YMCA. For the reasons expressed in this brief, the GAGV, like the nature preserves, nonetheless qualifies for a tax exemption.

discussion of whether or not the earlier decisions were "overruled" is nothing but a red herring.

Mohonk, Botanical Garden and Symphony Space do not overrule earlier decisions because there was no need for the Court of Appeals to do so. These cases merely articulate the interpretation of R.P.T.L. §420-a that had already been implicit in the earlier cases cited by the City. For instance, in Association of the Bar, City of New York v. Lewisohn, 34 N.Y.2d 143 (1974), the Court of Appeals expressly considered whether the association was organized "exclusively for one or **a combination** or the denominated statutory purposes." 34 N.Y. 2d at 153. Likewise, in Swedenborg v. Lewisohn, 40 N.Y.2d 87 (1976), the Court of Appeals, in determining the foundation's primary purpose, considered a combination of possible categorical purposes. 40 N.Y.2d at 95.

Even if the Mohonk, Botanical Garden and Symphony Space cases could be read as a more expansive reading of the law, necessary perhaps to address the consideration of tax exemption for new types of organizations, they still do not overrule prior law. No earlier case had ever held that an organization could not qualify for a property tax exemption by qualifying for an assortment or combination of the statutory categories. Thus, Mohonk, Botanical Garden and Symphony Space are entirely consistent with earlier cases.

In either event, the inability of the organizations in these three cases to fit entirely within a particular category did not defeat their qualification for tax exemption when their primary

purposes falling within a combination of the categories rendered them eligible. Likewise, the GAGV's inability to be solely or completely categorized as "educational" or "charitable" or for the "mental and improvement of men, women and children" does not defeat its eligibility when its primary purpose meets a combination of the permitted categories. Therefore, like the organizations in these three cases, the GAGV is eligible for a real property tax exemption.

Because the City cannot accept that an organization may qualify for a tax exemption under a hybrid or combination of eligible purposes, the City is left with no alternative but to argue at great length that the GAGV not organized and conducted exclusively for educational purposes, See App. Brief, p. 23, a claim the GAGV has never made.

In attempting to show that the GAGV is not organized and conducted for educational purposes the City resorts to likening the GAGV to the Swedenborg Foundation. In Swedenborg Foundation v. Lewisohn, 40 N.Y.2d 87 (1976), the Court of Appeals concluded that the Swedenborg Foundation had as its primary purpose the publishing and distribution of the works of Emanuel Swedenborg. See 40 N.Y.2d at 90. However, as the court below appropriately held, the GAGV engages in a wide variety of activities and purposes, far exceeding in scope that of the Swedenborg Foundation's, placing the

GAGV squarely within the intention of the statute. See, e.g., (20).[8]

The City also argues that the GAGV cannot meet the statutory test for mandatory exemption because it does not distribute goods and services to the financially needy and engages in advocacy.[9] Thus, the City argues, the GAGV is neither educational nor charitable. See App. Brief, pp. 20-21, 28.

However, there is no basis in law for adding additional criteria to the statutory purposes that render an organization eligible for mandatory tax exemption. Indeed, once again, in deciding the Symphony Space case, the Court of Appeals addressed and discarded an argument analogous to the City's. The Court held that:

> There is nothing in the statute which would indicate that property used for performing arts is excluded from an absolute tax exemption **if it otherwise qualifies under the general categories** of subdivision 1 of section

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[8] The City also attempts to compare the GAGV to the Asia Society. However, in Asia Society v. Tax Commission of NYC, 92 A.D.2d 781 (1st Dep't 1983), the issue before the court was whether the Asia Society qualified under only the educational category. Since the GAGV concedes that its primary purposes are not strictly educational, and that it could not qualify for a property tax exemption in the educational category only, this case is irrelevant. See also Church Home of the Protestant Episcopal Church in the City of Rochester v. Wagner, 58 A.D.2d 972, 974 (4th Dep't 1977) (finding the City of Rochester's reliance on Swedenborg and Association of Bar of N.Y. v. Lewisohn was misplaced).

[9] In contrast to its earlier position, the City now appears to concede that an organization's advocacy component, unless it "stands alone," does not in itself defeat eligibility for an exemption. See App. Brief, p. 23. Because it is abundantly clear in the Record that the GAGV's advocacy activities do not "stand alone," and that its primary purposes fall within an assortment of statutory purposes, the GAGV is eligible for a mandatory property tax exemption.

> 420-a of the Real Property Tax Law (case omitted).

60 N.Y.2d at 38 (emphasis added). Thus, as was properly recognized by the court below, there is nothing in the statute that precludes the GAGV, which otherwise qualifies for a property tax exemption because it has a combination of charitable, educational, and "moral or mental improvement of men, women or children" purposes, from obtaining a property tax exemption simply because one of its purposes is to promote the eradication of discrimination against lesbians and gay men.[10]

The City's argument that "serving the low-income population is a crucial part of the test for charitability" is especially specious. See App. Brief, p. 28. First, as discussed above, additional criteria cannot exclude an organization from tax exemption if it otherwise qualifies. Second, this Court itself has previously instructed the City of Rochester that the test of a charitable use is:

> If the purpose to be attained is personal, private or selfish, it is not a charitable trust. When the purpose accomplished is that

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[10] It is illustrative that the 14621 and 19th Ward Associations, which advocate on behalf of their constituency (198-204, 212-216), were granted property tax exemptions by the City, as was the YWCA, which advocates for the elimination of racism (217-224), the Regional Council on Aging, which advocates for seniors, (205-211), and the Ibero-American Action League, which advocates on behalf of the Latino community (248-249). Although it is true that the granting of a tax exemption to one organization is not determinative of whether a similar organization meets the legal requirements, the City's repeated granting of tax exemptions to other organizations engaged in advocacy indicates that, in fact, advocacy is not a bar for tax exemption and that it is spurious for the City to say it is.

> of public usefulness unstained by personal, private or selfish considerations, its charitable character assures its validity.

Church Home of the Protestant Episcopal Church v. Wagner, 58 A.D.2d 972,974 (4th Dep't 1977) (citing Matter of MacDowell, 217 N.Y. 454, 460). The City may not, as it appears to have attempted to do in Church Home, create its own additional criteria in order to unduly restrict the organizations eligible for tax exemption.[11]

Like Symphony Space and like the Mohonk and other nature preserves, and as the court below was correct in holding, the GAGV's primary purposes are in combination educational, charitable and relevant to the mental and moral improvement of men, women and children. Therefore, for the cogent reasons articulated by the court below, the GAGV is entitled to a mandatory property tax exemption under New York Real Property Tax Law §420-a.

POINT 2: BY TREATING THE GAGV DIFFERENTLY THAN OTHER ORGANIZATIONS IN ITS DECISION TO DENY THE GAGV A PROPERTY TAX EXEMPTION, THE CITY VIOLATED THE GAGV'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO FREEDOM OF SPEECH, ASSOCIATION AND EQUAL PROTECTION UNDER LAW.

> Above all else, the First Amendment [to the United States Constitution] means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

Police Department of City of Chicago v. Mosley, 408 U.S. 92, 95, 92

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[11] The City has previously attempted to preclude tax exemption of the GAGV by adding the additional criteria of "receiving government grants" (271). As the GAGV has demonstrated that it receives grants, the City appears to have withdrawn this argument. However, its previous requirement of this additional criteria demonstrates it continuing refusal to apply the law as written in the statute and interpreted by this Court and the Court of Appeals.

S.Ct. 2286, 2290 (1972). The free speech guarantee of the New York Constitution, found at Article 1, §8, is even more expansive than the minimum protections afforded by the federal constitution. See Immuno AG. v. J. Moor-Jankowski, 77 N.Y.2d 235, 249 (1991). Similarly, the related free association protections of the First Amendment to the United States Constitution and Article 1, §9 of the New York State Constitution mean that a government cannot restrict a group's right to associate based on its philosophy. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 293, 295, 102 S.Ct. 434, 437 (1981); NAACP v. Alabama, 357 U.S. 449, 460, 78 S.Ct. 1163 (1958). Finally, the equal protection clauses of the federal and New York State Constitutions, in conjunction with their respective free speech clauses, forbid a governmental entity from permitting the expression of some views but not others. Police Department of City of Chicago v. Mosley, 408 U.S. at 96, 92 S.Ct. at 2290. Examining the City's persistent refusal to grant a property tax exemption to the GAGV with these fundamental precepts in mind, it is clear that its conduct is constitutionally indefensible.

As the court below recognized, the Record in this action graphically and indisputably discloses that the City has intentionally treated the GAGV differently than other organizations applying for property tax exemptions in the following respects, discussed in more detail below:

- First, the City has time and again granted mandatory property tax exemptions to other organizations that have

the specific traits that the City has stated at various times disqualify the GAGV from obtaining a property tax exemption.

- Second, with the sole exception of the GAGV, the City has not denied exemptions to organizations with purposes and functions analogous to those of the GAGV, and has not denied exemptions to organizations that have the characteristics that the City has claimed, at various times, disqualify the GAGV from an exemption.

First, as described in detail in the Facts, the City has, on different occasions, justified its denial decision on the ground that the GAGV has an advocacy component, and on the ground that the GAGV does not provide goods and services exclusively to indigent persons. However, the undisputed Record makes it clear that the City has consistently granted property tax exemptions to other organizations with explicit and central advocacy purposes and activities, and to organizations that do not provide goods and services exclusively to indigent persons. For example, the primary advocacy purpose of Group 14621 Community Association, Inc., which has a property tax exemption, are:

> [t]o further the interest[s] of the inhabitants and residents [of the geographic area]; and
>
> [t]o promote and encourage laws for the protection of the inhabitants of the area.

(198). Similarly, the advocacy component of the Regional Council on Aging, Inc., which has a property tax exemption, is far from ambiguous:

> The mission of the Regional Council on Aging shall encompass both direct service and advocacy. ...
>
> Advocacy is another priority for this agency and shall be pursued by board and staff, while maintaining as an ideal that seniors advocating on their own behalf is the most effective form of senior advocacy.

(206). Likewise, the advocacy functions of the 19th Ward Community Association of Rochester, New York, Inc. are plain. The organization exists, in part:

> 1) to create a conscious multi-racial community where individual and cultural differences are not only tolerated but celebrated, and where people share a sense of community;
>
> 2) to insure that the community, through the Association, determines and receives the kinds of high quality services it needs from public and private institutions;
>
> 3) to encourage resident home ownership and oppose any threat to the residential character of the community.

(212). The Young Women's Christian Association of Rochester and Monroe County, New York, Inc. is organized expressly for the following unambiguous advocacy purpose:

> OUR ONE IMPERATIVE:
>
> The Association affirms the One Imperative, "to thrust our collective power toward the elimination of racism wherever it exists and by any means necessary."

(219).

Finally, the Ibero-American Action League, Inc. advocates for the rights of Latinos (248).

The City cannot deny the advocacy purposes and functions of

these organizations, all of which have property tax exemptions.[12] Yet in March 1991, the City justified its denial of the GAGV's exemption application on the ground that the GAGV has an advocacy component (235-236).

In November 1992, 21 months after it first denied the GAGV's application, the City asserted yet another rationale for its decision: the failure of the GAGV to target its activities chiefly to low-income persons (271).[13] However, as the court below noted, the City has also granted property tax exemptions to organizations that do not, as a chief function, provide goods and services exclusively to indigent persons.[14] The court below properly observed that the stated purposes of neither the 19th Ward Community Association or Group 14621 Community Association reveal any intent to service predominantly low-income persons (21-22). The WXXI Broadcasting Council, affiliated with Rochester's public

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[12] In its own examination of the City's computer-generated property tax exemption list (183-197), the court below properly noted other organizations with property tax exemptions that "are at least as much counselling and advocacy groups as medical ones (Planned Parenthood, the Drug and Alcohol Council, Cancer Action, the Association for the Learning Disabled, [and] the Genesee Valley Heart Association)" (24).

[13] The City also asserted for the first time that the GAGV was not entitled to an exemption because, unlike other organizations that have exemptions, the GAGV received no public grants (271). The Record proves, however, that the GAGV does, in fact receive public grants (245).

[14] Furthermore, as the court found, many of the GAGV's activities contain a strong secondary focus on the needs of the less affluent (22, 242-245, 311-315). Examples of such activities include those in conjunction with the DePaul Mental Health Clinics, safe sex workshops and other activities designed to meet the needs of those with AIDS.

broadcasting station, obviously does not have as a fundamental goal the provision of goods and services to primarily to financially needy persons.[15] Additionally, the Regional Council on Aging is organized explicitly to serve and advocate for all elderly persons, not just financially impoverished senior citizens (205-211). As the City Assessor concedes, the exempt RCOA has activities that serve "various segments" of the elderly community (271). (205-211, 271).[16]

These examples, representing a variety of organizations with a variety of specific purposes and activities, are not simply arbitrary "mistakes" made by the City in granting property tax exemptions. Rather, as the court below concluded, they illustrate the City's consistent practice of granting property tax exemptions to organizations other than the GAGV that, like the GAGV, have a strong advocacy component or provide goods and services that are neither necessarily nor exclusively targeted to indigent persons.[17]

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[15] The categorical bases for WXXI's property tax exemption categories are not stated on the City's computer list (188). Nevertheless, under the City's own definition (326), WXXI is not exclusively "educational" for tax exemption purposes because it is not a degree-granting institution of learning. Therefore, like the GAGV, WXXI must qualify for its tax exemption, at least in part, as a "charitable" organization.

[16] It is highly probable that the other organizations with property tax exemptions by the court below similarly do not provide goods or services predominantly to indigent persons to the exclusion of wealthier persons. See organizations listed at (24).

[17] The City contends that the lower court erred when it came to this conclusion because, in so doing, the court erroneously found that the 19th Ward and the Group 14621 Community Associations do not target their activities primarily to indigent persons. See Appellant's Brief, p. 28. This argument is unavailing for two

Second, the undisputed evidence in the Record also makes it clear that, with the sole exception of the GAGV, the City has not denied exemptions to organizations with purposes and activities analogous to those of the GAGV, and has not denied exemptions to organizations with the characteristics that the City claims disqualify the GAGV. Of the thirteen organizations whose property tax exemption applications were denied (247, 271), eight denials involved organizations that are apparently religiously affiliated, totally distinct from the GAGV. Two denials involve organizations that operate commercial residences that are rented to senior

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reasons.

First, assuming that the City's assertions about Group 14621 and the 19th Ward Community Associations' indigency-directed activities is true, this fact does not undermine the court's factual finding that the City has granted property tax exemptions to other charitable-related organizations that do not chiefly target the low-income population, such as the Regional Council on Aging and WXXI.

Second, the City Assessor's assertion that Group 14621 and the 19th Ward Associations exclusively target low-income populations is not supported by any evidence in the Record. Once the GAGV introduced evidence in the Record supporting its factual assertion that these two organizations, like the GAGV, did not specifically target low-income persons for its services, it was the City's obligation to submit adequate evidence that rebutted this factual assertion. See Kracker v. Spartan Chemical Co., Inc., 183 A.D.2d 810, 811 (2d Dep't 1992); Pokoik v. Gittens, 171 A.D.2d 470, 471 (1st Dep't 1991). Other than the City's unsubstantiated statement to the contrary, the City utterly failed to introduce any such evidence. Having failed to rebut the GAGV's evidence regarding the purposes and functions of these organizations, the GAGV's factual assertions must be presumed to be true. See Kuehne & Nagel, Inc. v. Baiden, 36 N.Y.2d 539, 544 (1975); Siegel, New York Practice (2d ed.) §281 (1991).

citizens, a function also entirely distinct from those of the GAGV.[18] The Rochester Recreation Club for the Deaf has a self-defined central purpose, decidedly unlike that of the GAGV, of recreation.[19] Finally, the University Club is primarily an athletic and dining club (246).[20]

The City's consistent pattern of granting, and not denying, property tax exemptions to other organizations with characteristics that the City has offered as its various excuses for denying the GAGV its property tax exemption is instructive in two regards. First, it demonstrates the flagrant contradiction between the City's various articulated explanations for denying a property tax exemption to the GAGV and its actual practice of granting, and not denying, property tax exemptions to organizations that have these traits.

Second, it reveals that the City's ostensible excuses for denying a property tax exemption to the GAGV -- namely, at various times, that the GAGV is not an educational institution of learning,

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[18] These organizations are the Presbyterian Residence Center Corporation and the Rochester Presbyterian Home. See Presbyterian Residence Center Corporation v. Wagner, 66 A.D.2d 998 (4th Dep't 1978).

[19] According to counsel for the Rochester Club for the Deaf, the Club had a property tax exemption for many years, but it was recently revoked when it moved because it is licensed to sell liquor.

[20] The inclusion of property owned by the Ibero-American Action League and the Westside Health Services on the City's property tax exemption denial list is manifestly erroneous. See Affidavit of Betty Dwyer (256-257); City's computer-generated list of tax exempt properties (192). In fact, the Ibero-American Action League owns many tax exempt properties, including the empty lot mistakenly included on the denial list (183-187, 248-249, 256-257).

that the GAGV has an important advocacy component, that the GAGV does not receive public grants (a factually incorrect excuse), and that the GAGV fails to target its services to financially indigent persons -- are all bogus. The only relevant difference between the GAGV and other organizations with advocacy-related purposes, to which the City has consistently granted property tax exemptions, is that the GAGV's membership is predominantly homosexual, and its perspective is gay and lesbian rights, while the perspectives of the other organizations are perhaps less controversial.

Under the circumstances, the court below correctly found that the Record conspicuously and undeniably demonstrates that the City's differential treatment of the GAGV's application is by no stretch of the imagination a simple mistake. Rather:

> there is only one reasonable explanation for the Assessor's denial of the GAGV's application: that the GAGV was denied a tax exemption because the Assessor (and the City) saw support, education and advocacy for the gay and lesbian community in a different light than it did support, education and advocacy for, e.g., residents of the 14621 or 19th Ward neighborhoods. The other explanations offered by the City are unsatisfactory and unsupported by the record. Thus, the GAGV's application received discriminatory treatment on the basis of the character of its membership and the content of its speech, clear denials of it Constitutional rights. unstated, the actual reason defendant denied the GAGV a property tax exemption is conspicuously obvious. Such a discriminatory application of the property exemption law, based as it is on the GAGV's membership and the subject matter of its viewpoint, violates the GAGV's constitutional rights.

(25).

Simply put, the City cannot, consistent with the interrelated

constitutional guarantees of free speech, freedom of association, and equal protection, apply the property tax exemption statute in a manner that grants property tax exemptions to organizations whose membership and point of view it endorses, but deny property tax exemptions to organizations whose membership and points of view he dislikes. See Carey v. Brown, 447 U.S. 455, 460-63, 100 S.Ct. 2286, 2290-91 (1980); Police Department of Chicago v. Mosley, 408 U.S. at 99-102, 92 S.Ct. at 2292-93. Accordingly, the City's denial of the GAGV's application for a property tax exemption is clearly unconstitutional. See Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983); Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697 (1972); Gay Students Organization of University of New Hampshire v. Bonner, 509 F.2d 652, 658-62 (1st Cir. 1974); Penthouse International, Ltd. v. Koch, 599 F.Supp. 1338 (S.D.N.Y. 1984); Planned Parenthood Association/Chicago Area v. Chicago Transit Authority, 592 F.Supp. 544, 552 (N.D. Ill. 1984); Coalition for Abortion Rights and Against Sterilization Abuse v. Niagara Frontier Transportation Authority, 584 F.Supp. 985, 989 (W.D.N.Y. 1984); North Shore Right to Life v. Manhasset American Legion Post No. 304, Town of North Hempstead, 452 F.Supp. 834, 838-39 (E.D.N.Y. 1978); Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Commission, 417 F.Supp. 632, 637 n.6, 641-42 (D.R.I. 1976). See also Matter of Frankel v. Roberts, 165 A.D.2d 382 (1st Dep't 1991).[21]

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[21] That the City intentionally discriminated against the GAGV due to the subject matter of its ideas when it denied the GAGV a property tax exemption is also evident from the City's letter to

The equal protection implications of City's denial decision are also apparent from a case remarkably similar to this action that was decided nearly twenty years ago. In Matter of Thom, 33 N.Y.2d 609 (1973), the Appellate Division had denied corporate status to Lambda Legal Defense & Education Fund, Inc., an organization committed to the legal representation of lesbians and gay men on issues relating to their homosexuality, and an amicus in this appeal. The Appellate Division denied the application ostensibly because Lambda was not "benevolent" or "charitable" in purpose. The Court of Appeals reversed the denial in a per curiam decision because the Appellate Division's conclusion was "unsupportable." 33 N.Y.2d at 609. The concurring opinion observed that the purposes and functions of Lambda were nearly identical to those of the Puerto Rican Legal Defense and Education Fund, Inc., whose corporate status the Appellate Division had previously approved. Under these circumstances, the Appellate Division's explanation for its Lambda decision was inconsistent with its practice, and therefore violated Lambda's right to equal

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the Board of Assessment Review. The City's Attorney wrote that the information provided by the GAGV in its educational activities was not "a neutral and disinterested offering of knowledge for its own sake." Instead, according to defendant's attorney, the information encompasses "a desire to cause social change" (236). This attempt to distinguish between the kinds of speech that defendant would approve cannot be tolerated under the constitutional guarantees to free speech. See, e.g., North Shore Right to Life Committee v. Manhasset American Legion Post No. 304, Town of North Hempstead, 452 F.Supp. 834 (E.D.N.Y. 1978); Coalition for Abortion Rights and Against Sterilization Abuse v. Niagara Frontier Transportation Authority, 584 F.Supp. 985, 989 (W.D.N.Y. 1984); Lawrence University Bicentennial Commission v. City of Appleton, Wisconsin, 409 F.Supp. 1319 (E.D. Wis. 1976).

protection under law. See 33 N.Y.2d at 612-16.

Notwithstanding the overwhelming documentary evidence of the City's intentionally differential treatment of the GAGV's property tax exemption application, the City continues to deny that it discriminated against the GAGV because of its positive gay and lesbian membership and message. To support its position, the City relies on the City Assessor's sworn statement that he did not intend to discriminate against the GAGV. See Appellant's Brief, pp. 26-27.

Illegal discriminatory intent is, however, rarely admitted or provable by direct evidence. Indeed, it is hardly a surprise that the City would deny the City's intent to discriminate unconstitutionally against the GAGV or any other tax exemption applicant. For this reason, courts have ruled that circumstantial evidence, such as a demonstrable departure from normal patterns, is sufficient to prove unconstitutional discrimination. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 267-68 (1977); Santiago v. Miles, 774 F.Supp. 775, 797 (W.D.N.Y. 1991). Further, for purposes of equal protection analysis:

> Discrimination need not be the sole purpose for the action. It is enough if plaintiffs show that a discriminatory purpose was a "motivating factor" in the administrative decision. See Arlington Heights, 429 U.S. at 265, 97 S.Ct. at 563; Hunter v. Underwood, 471 U.S. 222, 225, 105 S.Ct. 1916, 1918 (1985).

Santiago v. Miles, 774 F.Supp. at 797.

That the City has departed dramatically from its property tax

exemption history is proved not only by the unrefuted evidence that the City has repeatedly granted and not denied property tax exemptions to organizations that have characteristics identical to those for which the City denied the GAGV's application. Additionally, as the court below insightfully observed, the City's intent to discriminate is evidenced as well by the City's shifting sands of asserted rationales for denying the GAGV's application (25).

Since the GAGV applied for a property tax exemption in January 1991, the City has, over time, offered four purported reasons for denying the GAGV's application. Each time the City offered an ostensible reason for denying the GAGV's application, the GAGV demonstrated that based on the facts relating to itself or other organizations, the City's explanation was patently inapposite. Further, the City's "financially needy" and "public grant" rationales were offered for the first time in the context of this litigation, 21 months after the City denied the GAGV's exemption application, and 15 months after this litigation was commenced (269); City Assessor's Memorandum of Law, November 12, 1992, p. 8. These post hoc justifications are entitled to no evidentiary weight and, especially when discriminatory treatment is alleged, should be viewed with extreme skepticism. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 212, 109 S.Ct. 468, 473-74 (1988); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 940 (2d Cir. 1988); 303 West 42nd Street Corp. v. Klein, 46 N.Y.2d 686, 697 (1979).

It is the admittedly circumstantial but overwhelming, undisputed and irrefutable documentary evidence of deliberately disparate and discriminatory treatment upon which the court below properly relied in granting summary judgment for the GAGV. See Pokoik v. Gittens, 171 A.D.2d 470, 471 (1st Dep't 1991); Porter v. Callahan, 125 A.D.2d 891, 892 (3rd Dep't 1986). Accordingly, not only was the court's finding that the City violated the GAGV's constitutional rights not "premature," as the City insists; for the reasons stated above and by amici, it was correct.

POINT 3: IN LIGHT OF THE CITY'S EXTREME DELAY IN SEEKING DISCOVERY IMMATERIAL TO ITS DEFENSES, THE COURT BELOW PROPERLY BARRED THE CITY FROM CONDUCTING A DEPOSITION OF THE GAGV'S PRESIDENT, AND PROPERLY FOUND THAT A SANCTIONS HEARING IS WARRANTED.

On October 15, 1992, fourteen months after this case was commenced, the GAGV moved for summary judgment. As required by the C.P.L.R., the GAGV submitted its required Affirmation of Undisputed Facts it alleged were undisputed (164-181). To support its motion, the GAGV also submitted substantial documentation it had sought and collected over the previous fourteen months.

In response, on November 12, 1992, the City cross-moved for summary judgment, relying exclusively on the City Assessor's Affidavit (267-274). The City Assessor submitted no documents or other evidence either to rebut the GAGV's factual assertions, or to support its own summary judgment motion. Significantly, despite its failure to seek any disclosure from the GAGV during the previous fifteen months, the City neither stated nor implied that

it needed additional information from the GAGV to defend itself on the GAGV's statutory or constitutional claims. To the contrary, as the court below observed, on February 18, 1993, the City Assessor's attorney conceded in open court that it did not intend to file any further factual submissions, at least with respect to the GAGV's claims regarding its property tax exemption request (6, 10).

Yet on March 22, 1993, the City suddenly and unexpectedly served its first discovery requests on the GAGV, seeking several GAGV financial documents and to depose the GAGV's president.[22] There is not a shred of evidence in the Record that the City was somehow barred from conducting discovery between August 23, 1991 and the GAGV's summary judgment motion of October 15, 1992, the period during which the GAGV was accumulating evidence for its summary judgment motion. Nor is there any evidence that the City was somehow foreclosed from conducting discovery long before the eve of the GAGV's anticipated and expeditious Renewed Summary Judgment Motion, filed March 23, 1993 (16).

The court found that the City's demands, coming nineteen months after the commencement of the case, after it had already moved for summary judgment and on the eve of the GAGV's renewed Motion for Summary Judgment, were far too late, rested only on conjecture and surmise, and sought information immaterial and unnecessary to the additional issues raised in the GAGV's Amended

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[22] On March 23, 1993, the GAGV provided every document requested by the City (37e). However, the GAGV moved for a protective order to preclude the City from conducting a deposition of its president.

Complaint (13-16). The court's conclusion was entirely correct. Because the City Assessor had previously questioned the former president of the GAGV under oath at the administrative appeal hearing (37e), and because the City did not deny any of the facts alleged in the affidavits submitted by GAGV's former and current presidents (242-245, 311-315), the City's need for even more information from the GAGV's president was non-existent. Further, by cross-moving for summary judgment on November 12, 1992, the City necessarily implied that the submission of additional information was unnecessary.

To justify its purported need to conduct a deposition on the eve of a resolution of this case, the City displays a kernel of honesty: it realized, late in the litigation, that it was probably going to lose the GAGV's soon-to-be-renewed summary judgement motion. See App. Brief, p. 31. The City had apparently gambled that it did not have to introduce any evidence of significance to rebut the substantial factual evidence submitted by the GAGV. Indeed, as of November 1992, the City's position was that there was no need to uncover additional facts; its cross motion for summary judgement did not raise any material issues that remained unresolved.

The court below delayed proceeding on the parties' fall 1992 summary judgment motions to allow certain procedural matters to be resolved -- and perhaps to give the City an opportunity to settle gracefully a losing case out of court. Instead of heeding the court's subtle suggestions, the City responded with nothing more

than an eleventh-hour demand for a fishing expedition that would have served no legitimate purpose. Under these circumstances, the court below properly granted the GAGV's Motion for a Protective Order. See Kracker v. Spartan Chemical Co., Inc., 183 A.D.2d 810, 813 (2d Dep't 1992); Levy, King & White Advertising, Inc. v. Gallery of Homes, Inc., 177 A.D.2d 967, 967-968 (4th Dep't 1991); Home Savings Bank v. Arthurkill Associates, 173 A.D.2d 776, 777 (2d Dep't 1991); Church Home of the Protestant Episcopal Church in the City of Rochester v. Wagner, 58 A.D.2d 972, 973 (4th Dep't 1977) (City of Rochester not entitled to complain about purported need for discovery when it served no discovery requests until the summary judgment return date seven months after action commenced).

Because the circumstances surrounding the City's discovery requests were procedurally questionable, the court below also, sua sponte, authorized a hearing to determine if sanctions under 22 N.Y.C.R.R. §130-1 should be imposed. As the court observed, the City's extreme delay in serving its last-minute discovery demand for irrelevant information, coupled with its previous statements to the court that no further evidence was needed, strongly suggest that the City served its discovery demands to harass the GAGV and to unnecessarily delay a resolution of this action (11).

The court below was unquestionably in the best position to determine if the City's discovery request was egregious enough within the context of the whole action to warrant at least a hearing on the appropriateness of sanctions. Certainly, given that this Court chastised the City of Rochester's nearly identical

strategy of waiting until summary judgment before serving discovery requests in a similar property tax exemption case sixteen years ago, the City was on notice that duplicating this strategy in this action was potentially censurable. See Church Home of the Protestant Episcopal Church in the City of Rochester v. Wagner19, 58 A.D.2d 972, 973 (4th Dep't 1977).[23] The fact that the court raised the sanctions issue sua sponte indicates that the City's actions offended the court's own sense, based on years of experience, of judicial fair play. This Court should not discourage trial courts from at least exploring the possibility of sanctions when the court itself feels that grossly improper and dilatory litigation tactics have been employed. See Dutch Church v. 198 Broadway, 76 N.Y.2d 411, 414 (1990) (sanctions for deliberately dilatory conduct are appropriate).

For these reasons, the court's decision to conduct a sanctions hearing was entirely justified, and should be affirmed.

POINT 4. SO LONG AS IT PREVAILS ON ITS CLAIM THAT IT IS ENTITLED TO A PROPERTY TAX EXEMPTION, THE GAGV IS ENTITLED TO ATTORNEYS FEES UNDER 42 U.S.C. §1988.[24]

Under 42 U.S.C. §1988, the prevailing party in an action brought under 42 U.S.C. §1983 to enforce that party's constitutional rights is entitled to reasonable attorney's fees

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[23] The City's two Attorneys-of-Record in this action were the City's Attorneys-of-Record in Church Home of the Protestant Episcopal Church.

[24] Despite its Notice of Appeal, the City's Appellate Brief does not address the lower court's decision to award attorneys' fees to the GAGV.

unless special circumstances would render such an award unjust. Matter of Thomasel v. Perales, 78 N.Y.2d 561, 567 (1991). Moreover, attorney's fees are available to the prevailing party where relief is sought on both state and federal grounds, but awarded on state grounds only. Fees should be awarded in such a case as long as the federal claim is "substantial" -- meaning "'not wholly insubstantial,' 'obviously frivolous' or 'obviously without merit'" -- and arises out of a "common nucleus of operative fact" as the state claim. See Matter of Thomasel v. Perales, 78 N.Y.2d at 568; Cleary v. Perales, 191 A.D.2d 209 (1st Dep't 1993).

The GAGV in this case seeks, on both state and federal grounds, a reversal of the City Assessor's denial of its request for a property tax exemption. If this Court affirms the decision of the court below that the GAGV is entitled to a property tax exemption for any reason, there can be question that the GAGV is a prevailing party for attorneys' fees purposes.

Further, in light of the evidence of defendant's discrimination against the GAGV for reasons that can be ascribed only to the GAGV's message and membership, the GAGV's federal constitutional claims in this action are certainly "substantial" for purposes of an attorneys' fee award. Even the City does not argue that the GAGV's constitutional claims are blatantly untenable. Rather, it argues only that a decision on these claims is premature. See Appellant's Point 2. Moreover, the GAGV's state and federal claims all rise out of a "common nucleus of operative fact": i.e., defendant's denial of its application for a property

tax exemption.

Thus, this Court should make it clear that if it affirms that the GAGV is entitled to a property tax exemption, the GAGV remains a prevailing party for purposes of its entitlement to attorneys' fees, even if this Court reverses or remands the finding of the court below as to the GAGV's federal constitutional claims.

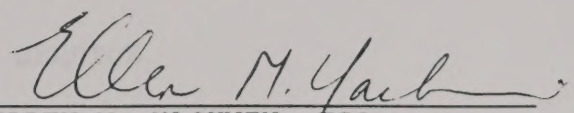
CONCLUSION

The City's denial of the GAGV's application for a mandatory property tax exemption under N.Y. Real Property Tax Law §420-a violates the GAGV's entitlement to the exemption under the statute, as well as its rights to free speech, freedom of association and equal protection under law, as guaranteed by the United States and New York State Constitutions. Further, in light of all the proceedings in this case, the court below properly granted the GAGV's Motion for a Protective Order, and properly found that a hearing pursuant to 22 N.Y.C.R.R. §130-1 was warranted to determine whether sanctions should be imposed. Finally, the court's determination that the GAGV is entitled to attorneys' fees was correct.

Accordingly, for the reasons stated above and by amici, the GAGV respectfully requests this Court to affirm the decision below in all respects.

November 9, 1993

Respectfully submitted,



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AFFIRMATION OF SERVICE

ELLEN M. YACKNIN, an attorney admitted to practice in the courts of New York State, hereby affirms the following to be true under penalty of perjury:

On November 9, 1993, I served two copies of Respondent's Brief on appellant by personally delivering these copies to the appellant's attorney at the following address:

LOUIS N. KASH, Corporation Counsel
SUSAN L. HAUSER, Municipal Attorney
Attorneys for Defendant
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30 Church St.
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Ellen M. Yacknin

ELLEN M. YACKNIN, ESQ.

November 9, 1993

AFFIRMATION OF SERVICE

ELLEN M. JACKNIK, an attorney admitted to practice in the courts of New York State, hereby affirms the following to be true under penalty of perjury:

On November 9, 1991, I served two copies of Respondent's brief on appellant by personally delivering these copies to the appellant's attorney at the following address:

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November 9, 1991

Form 5. DAILY RECORD CORP.

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1621

PRESENT: CALLAHAN, J.P., PINE, FALLON, DOERR, DAVIS, JJ.

GAY ALLIANCE OF GENESEE VALLEY, INC., RESPONDENT,

V

CITY ASSESSOR, CITY OF ROCHESTER, APPELLANT.

The above named City Assessor, City of Rochester, having appealed to this Court from the judgment (denominated order) of the Supreme Court, entered in the Monroe County Clerk's office on April 28, 1993, and said appeal having been argued by Susan Hauser of counsel for appellant, Ellen Yacknin of counsel for respondent, submitted by Evan Wolfson, amici curiae, Lambda Legal Defense and Education Fund, the American Civil Liberties Union and the New York Civil Liberties Union, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is modified on the law by dismissing plaintiff's cause of action alleging a violation of 42 USC § 1983, by vacating the award of attorney's fees pursuant to 42 USC § 1988 and by vacating the direction that a hearing be held to determine whether sanctions should be awarded under 22 NYCRR 130-1.1 (a) and as modified the judgment is affirmed without costs.

Memorandum which is hereby made a part hereof.

All concur except Callahan, J.P., who dissents in part and votes to reverse in a Memorandum.

Entered: February 4, 1994 CARL M. DARNALL, Clerk

Supreme Court

APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, CARL M. DARNALL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this* FEB 4 1994

.....

Clerk.

filing of the quitclaim deed, American Express entered a judgment against defendant in the amount of $30,827. Defendant's debts were discharged in bankruptcy on June 26, 1989 and plaintiff was listed on the schedule of unsecured creditors as a disputed, contingent creditor, for an unliquidated amount. Thereafter, the parties modified their separation agreement regarding defendant's child support obligations. The modification agreement further stated that "all other items and conditions of said separation agreement that have not been deleted or modified herein shall remain in full force and effect".

Supreme Court erred in directing defendant to indemnify, hold plaintiff harmless from, and pay in full the lien on the former marital residence that is held by American Express in the "event that the lien is enforced". Defendant's contingent debt to plaintiff was discharged in bankruptcy (*see*, 11 USC § 524 [a] [2]; § 727 [b]; *cf.*, *Matter of Neier*, 45 Bankr 740). Defendant did not reaffirm that contingent debt to plaintiff by the terms of the modification agreement. It is well established that "[t]he modification of a contract results in the establishment of a new agreement between the parties that *pro tanto* supplants the affected provisions of the original agreement while leaving the balance of it intact" (*Beacon Term Corp. v Chemprene, Inc*, 75 AD2d 350, 354, *lv denied* 51 NY2d 706; *see also*, *Cortesi v R & D Constr. Corp.*, 137 AD2d 901, *mod on other grounds* 73 NY2d 836). Thus, here, "the terms of the old contract which were not modified remained viable" (*Cortesi v R & D Constr. Corp.*, *supra*, at 902). (Appeal from Order of Supreme Court, Monroe County, Calvaruso, J. - Modify Divorce Decree.) PRESENT: CALLAHAN, J.P., PINE, FALLON, DOERR, DAVIS, JJ. (Filed Feb. 4, 1994.)

1621. (Monroe Co.) -- GAY ALLIANCE OF GENESEE VALLEY, INC., RESPONDENT, V CITY ASSESSOR, CITY OF ROCHESTER, APPELLANT. -- Judgment modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Supreme Court granted plaintiff's motion for summary judgment and ordered that plaintiff be granted a tax exemption pursuant to Real Property Tax Law § 420-a (1) (a) for its community center located in the City of Rochester. Defendant contends that plaintiff failed to demonstrate entitlement to tax exempt status under any one of the discrete categories denoted in Real Property Tax Law § 420-a (1) (a). We disagree.

Real Property Tax Law § 420-a (1) (a) provides:

> "Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as herein-after provided shall be exempt from taxation as provided in this section."

The Court of Appeals has held that section 420-a (1) (a) of the Real Property Tax Law "encompass[es] property used primarily for various and varied charitable and educational purposes and the moral and mental improvement of the citizenry" (*Symphony Space v Tishelman*, 60 NY2d 33, 37, citing *Mohonk Trust v Board of Assessors*, 47 NY2d 476, 484). The record establishes that plaintiff is a not-for-profit corporation and that its activities include a peer facilitation counseling program, a speakers bureau providing speakers to high school and university classes and other organizations and the publication of a monthly newspaper. Those activities are available free of charge to the general public. Based on those facts, we conclude that plaintiff corporation is "organized or conducted exclusively for * * * educational or moral or mental improvement of men, women, and children" and thus, that Supreme Court properly granted summary judgment ordering that plaintiff be granted tax exempt status.

Supreme Court erred, however, in awarding summary judgment on plaintiff's cause of action under 42 USC § 1983 for violating plaintiff's civil rights. Although defendant vigorously opposed plaintiff's application for tax exempt status, we conclude that its actions did not constitute a violation of plaintiff's civil rights. Thus, the cause of action alleging a violation of 42 USC §

1983 is dismissed and the court's award of attorney's fees pursuant to 42 USC § 1988 is vacated.

Finally, the court improvidently exercised its discretion in ordering a hearing to determine whether sanctions should be awarded under 22 NYCRR 130-1.1 (a). We conclude that sanctions are not warranted on this record.

All concur except Callahan, J.P., who dissents in part and votes to reverse in the following Memorandum: I agree that Supreme Court erred in awarding summary judgment on plaintiff's cause of action under 42 USC § 1983 for violating plaintiff's civil rights. I also concur that the award of attorney's fees pursuant to 42 USC § 1988 must be vacated and that sanctions under 22 NYCRR 130-1.1 (a) are not warranted. In my view, Supreme Court erred also when it granted plaintiff a tax exemption pursuant to Real Property Law § 420-a (1) (a).

Exemption status should be construed strictly against the taxpayer seeking the benefit of the exemption (*Symphony Space v Tishelman*, 60 NY2d 33, 36). Defendant contends that plaintiff does not qualify for an exemption because its activities do not fit into one of the applicable categories under Real Property Law § 420-a (1) (a), which are educational, charitable, or devoted to the moral or mental improvement of people. I agree. While plaintiff's purpose does encompass some educational types of activities such as sending speakers to various schools and organizations and publishing a monthly newsletter, those activities do not constitute an educational purpose that qualifies plaintiff for a tax exemption (*see, Swedenborg Foundation v Lewisohn*, 40 NY2d 87, 94-95; *Matter of Asia Soc. v Tax Comm. of City of N.Y.*, 92 AD2d 781, 782). Although aspects of plaintiff's activities may loosely be characterized as charitable or for the improvement of men, women and children, such activities, either singly or in combination with other tax exempt purposes, are not the principal purpose of the plaintiff corporation. The primary purpose of plaintiff corporation is to eradicate homophobia in the Rochester area and to educate the general public about homosexuality and other related issues such as AIDS. "Commendable and beneficial as this purpose is, it does not qualify the [corporation] for exemption from real property taxation" (*Matter of Swedenborg Foundation v Lewisohn, supra*, at 95). "[P]ublic benefit is not the test of qualification for exemption" (*Matter of Association of Bar of City of N.Y. v Lewisohn*, 34 NY2d 143, 154-155). Therefore, I vote to reverse the order appealed from in its entirety, deny plaintiff's motion and grant defendant's cross motion for summary judgment (*see, Matter of Asia Society, Inc. v Tax Comm. of the City of N.Y., supra*). (Appeal from Judgment of Supreme Court, Monroe County, Siracuse, J. - Summary Judgment.) PRESENT: CALLAHAN, J.P., PINE, FALLON, DOERR, DAVIS, JJ. (Filed Feb. 4, 1994.)

1622. (Steuben Co.) -- MATTER OF SUZANNE M. CURRAN AND L. JOHN AND BEVERLY A. WEBSTER, APPELLANTS, V ALBERT CLARK, CHAIRMAN, EDWARD VOUGHT, JOHN JENSEN, DOUGLAS MC CABE AND JOHN HOSIER, CONSTITUTING THE PLANNING BOARD OF THE VILLAGE OF HAMMONDSPORT, KENT COLLINS, ZONING OFFICER OF THE VILLAGE OF HAMMONDSPORT, ARTHUR CHAPMAN, BUILDING INSPECTOR OF THE VILLAGE OF HAMMONDSPORT, AND WALTER AND LINDA CARL, RESPONDENTS. -- Judgment unanimously affirmed with costs. (Appeal from Judgment of Supreme Court, Steuben County, Scudder, J. - Article 78.) PRESENT: CALLAHAN, J.P., PINE, FALLON, DOERR, DAVIS, JJ. (Filed Feb. 4, 1994.)

1623. (Steuben Co.) -- MATTER OF SUZANNE M. CURRAN AND L. JOHN AND BEVERLY A. WEBSTER, APPELLANTS, V ROBERT MATHEWSON, CHAIRMAN, SUSAN YARTYM, SUE KULKOWSKI, PETER GRIFFIN AND KEVIN BROWN, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE VILLAGE OF HAMMONDSPORT, KENT COLLINS, ZONING OFFICER OF THE VILLAGE OF HAMMONDSPORT, ARTHUR CHAPMAN, BUILDING INSPECTOR OF THE VILLAGE OF HAMMONDSPORT, AND WALTER AND LINDA CARL, RESPONDENTS. -- Judgment unanimously affirmed with costs. (Appeal from Judgment of Supreme Court, Steuben County, Scudder, J. - Article 78.) PRESENT: CALLAHAN, J.P., PINE, FALLON, DOERR, DAVIS, JJ. (Filed Feb. 4, 1994.)

1624. (Monroe Co.) -- PATRICIA PARKER, RESPONDENT, V TERRI CONNON, APPELLANT. APPEAL NO. 1. -- Judgment unanimously affirmed without costs. (Appeal from Judgment of Supreme Court, Monroe County, Cornelius, J. - Assault.) PRESENT: CALLAHAN, J.P., PINE,